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No. 04-1038

In the Supreme Court of the United States

RAJINDER SINGH,
a.k.a. Satinger Singh

Petitioner,

vs.

ALBERTO R. GONZALES,
Attorney General of the United States

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR REHEARING

EPHRAIM TAHIR MELLA, ESQUIRE
Counsel of Record
1814 Callowhill Street, First Floor
Philadelphia, Pennsylvania, 19130
(215) 640-9770

Counsel for Petitioner, Rajinder Singh

INTRODUCTION

In the light of the precedent-setting decision of the Court of Appeals for the First Circuit, in the case of *SUCCAR v. ASHCROFT*, 394 F.3d 8 (1st Cir. 2005), non-citizens in removal proceedings who meet the regulatory definition of an "arriving alien", including individuals who have been paroled into the United States, may apply for adjustment of status to that of a lawful permanent resident, on any basis and in any form, before either an Immigration Judge or the District Office of the Department of Homeland Security.

Since this recently-decided First Circuit case conflicts with the decision of the Third Circuit reached in the instant, on the issue of eligibility of an "arriving alien", who is in removal proceedings, to adjust status, there is a compelling reason, therefore, for this Honorable Court to grant the instant Petition for Writ of Certiorari.

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OPINION BELOW

The opinion of the Court of Appeals for the Third Circuit (Pet. App. A) was entered on August 27, 2004, under the caption *Singh v. Ashcroft*, No. 04-1501 (3rd Cir. 2004)(unpublished). Petitioner filed a timely Petition for Panel Rehearing. The Petition for Rehearing was denied on December 2, 2004. (Pet App. B).

JURISDICTION

The Petition for Writ of Certiorari has been filed within the reglementary period prescribed by law, which is on January 13, 2004, reckoned from ninety (90) days from the date of the decision of the Third Circuit Court of Appeals on December 2, 2004, denying Petitioner's Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

Petitioner hereby incorporates and repleads the Statement of the Case and Facts contained in his original Petition for a Writ of Certiorari as forming part and parcel of this Statement.

ARGUMENT

In the light of the recently decided case of *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005), there is a compelling need to review the record of the instant case, to determine

whether or not to grant the petition for writ of certiorari, considering that the issues raised in this case are similar in nature to those raised in *Succar*, except for the fact that the Third Circuit had rendered a decision which is contradictory to that reached by the First Circuit.

Conceding for the time being that Petitioner in this case is an "arriving alien" (albeit, Petitioner had contended that the revocation of his asylee status does not change the fact that he had entered the US without inspection and authorization, and therefore, he is deemed inadmissible, not an arriving, alien. *see Pet. 14*), Petitioner is nevertheless eligible to apply for adjustment of status, in accordance with the dicta laid down in *Succar*.

In that First Circuit case of *Succar*, petitioner Succar applied for asylum, and was paroled into the US. He was subsequently placed in removal proceedings, and admitted the factual allegations in the Notice to Appear and conceded removability. He renewed his application for asylum before the Immigration Judge. After conducting hearings on the merits, the Immigration Judge denied Succar's request for asylum and withholding of removal. He appealed the Immigration Judge's decision to the BIA.

While his appeal was pending, and while paroled into the US, Succar married a US citizen. His wife filed an immigrant petition for him, which was approved. Succar later filed a motion to remand with the BIA, seeking to remand his case to the Immigration Judge for consideration of his application for adjustment of status under 8 U.S.C. §§ 1255(a).

The remand proved to be fruitless for the INS took the position that under 8 C.F.R. §245.1(c)(8), Succar was ineligible to apply for adjustment of status either before the Immigration Judge in the removal proceedings or, separately, before the Immigration Service's district director.

At the hearing before the Immigration Judge, Succar submitted his application for adjustment of status. The Immigration Judge, however, opined that he had no "authority to adjust status to someone who is an arriving alien". Consequently, the Immigration Judge denied said application based on 8 C.F.R. §245.1(c)(8).

After elevating the matter to the BIA on appeal, the BIA affirmed the Immigration Judge's finding, and concurred with the latter that Succar was "ineligible for adjustment of status because he is an arriving alien".

Upon a petition for review with the First Circut, the court held that "there is no statutory bar to review and that the regulation, (8 C.F.R. § 245.1(c)(8), is contrary to the language and intent of the statute, 8 U.SC. §1255(a)." As a result, the First Circuit vacated the order removing Succar from the United States and remanded the case for further proceedings.

The First Circuit found its logic on the intention given by Congress when it passed the adjustment of status statute found in 8 U.SC. §1255(a). According to the First Circuit, "(T)he statutory scheme reflects Congress's careful balancing of the county's security needs against the national interests Congress wished to advance through adjustment of

status proceedings. The regulation upsets the balance Congress created."

The First Circuit further stated that when the law or statute expressly defines the persons or group of persons belonging to a particular category - such as those who have parole status, or parolees in removal proceedings - to be eligible for relief, the Attorney General does not have the discretion to choose those who are eligible for relief and those who are not. Applying the maxim "*inclusio unios est exclusio alterius*" - what the law does not exclude, it includes - it held that the Attorney General may exercise discretion only when the law or statute is silent on eligibility.

Summarizing its findings, the First Circuit held that Congress has been "explicit about where the Attorney General has been granted discretion and where he has not. By contrast with other areas, there is no explicit grant of discretion to redefine eligibility to apply for adjustment of status of parolees to exclude those in removal proceedings." (*Underline and bold ours*).

"Checking our construction of the statute against the legislative history of section 1255, we find the regulation to be inconsistent with the intent expressed in the statute. In 1960, when Congress included paroled aliens as aliens who are eligible for adjustment of status relief through section 1255, it did so to solve certain problems xx xx. The effect of the regulation is to re-institute the problems Congress wished to solve. Further, until the 1997 promulgation of the regulation, the Attorney General had consistently interpreted section 1255 in a manner consistent with the

statute and the legislative history and inconsistent with the 1997 regulation."

Like *Succar*, Petitioner Singh was a parolee who was placed in removal proceedings. He was granted parole prior to April 1, 1997, the effective date of 8 C.F.R. 245.1(c)(8). While in removal, Petitioner's wife, a lawful permanent resident and applicant for naturalization, filed an I-130 spousal petition on his behalf, which was approved. Subsequently, he filed an adjustment of status application before the Immigration Judge, who denied the same for lack of jurisdiction based on 8 C.F.R. 245.1(c)(8). The BIA, on appeal, affirmed the Immigration Judge's denial.

Unlike the First Circuit, however, the Third Circuit dismissed Petitioner's Petition for Review, and likewise, his Petition for Panel Rehearing, on two (2) grounds, namely that: a) Petitioner was a an "arriving alien and parolee; and b) Petitioner's entry into the United States was without inspection and admission. It likewise upheld the validity of the regulation, 8 C.F.R. 245.1(c)(8). Hence, under the foregoing circumstances, there is no cavil beyond doubt that a further review of the facts and issues asseverated by Petitioner is warranted to achieve uniformity in the interpretation of federal laws by the circuit courts.

CONCLUSION

WHEREFORE, it is respectfully prayed that Petitioner's petition for certiorari be granted by this Hon. Court.

EPHRAIM TAHIR MELLA, ESQ.
Attorney for Petitioner
1814 Callowhill Street, First Floor
Philadelphia, PA 19130
Tel. (215) 640-9770

CERTIFICATION

This is to certify that this Petition for Rehearing is resstricted to the grounds set forth in the above arguments of counsel, and that it has been filed in good faith, and not for the purpose of any delay.

EPHRAIM TAHIR MELLA, ESQ.